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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/998,661	12/03/2001	Todd Charles McNeel	0914-1412-INV2	7552

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EXAMINER

MADSEN, ROBERT A

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 06/02/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/998.661

Applicant(s)

MCNEEL ET AL

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 March 2004.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

1. The Amendment filed March 3, 2004 has been entered. Claims 1-3 remain pending in the application.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Claims 1 -3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wisdom et al. (US 4122198) in view of Hilton et al. (US 4052838) and Khalsa (US 5298274) and MacKendrick (US 3520248). See the reasons stated in paragraphs 3-8 in the Office Action of November 6,2003.

Response to Arguments

4. Applicant's arguments filed March 3, 2004 have been fully considered but they are not persuasive.
5. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).
6. Applicant further argues that there fails to be a plausible motivation for combining the references. In response to applicant's argument that there is no

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suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837

F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

7. In this case, Wisdom et al. teach a method of forming tortilla chips in a manner which facilitates subsequent packaging in a stacked arrangement wherein chips and differ from the pending claims in that Wisdom et al fail to teach a particular chip shape and the particular method of frying/baking wherein dough is held in the molds *during* frying or baking, such that the base edges and apex corners of successive tortilla chips are in alternating orientation in the mold.

8. Hilton et al. also teach a method of forming corn-based dough chips in a manner which facilitates subsequent packaging in a stacked arrangement, but further teach frying corn dough-based products in molds will yield *uniform* stackable corn-based chips that can be packed in containers that correspond to the chip shapes. Thus, Hilton et al. teach a method of frying to facilitate stacking/packing of chips, like Wisdom et al., wherein the advantage is that the chips are *uniform*. One of ordinary skill in the art would recognize that a *uniform* chips would facilitate subsequent packaging in a stacked arrangement more than chips that were similar but not uniform *per se*. Thus Hilton et al. do provide motivation for modifying the fry step of Wisdom in that Hilton et al. attempt to

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solve the same problem as Wisdom et al. : facilitate subsequent packaging in a stacked arrangement and *improves* the method of Wisdom et al. by providing *uniform* chip.

9. With respect to Khalsa, it was notoriously well known, as evidenced by the references cited, that fried corn-based dough chips are produced in a variety of shapes. Khalsa is relied on as evidence of the conventionality of producing fried tortilla chips in a triangular shape. Thus, selecting any particular conventional shaped, absent any persuasive evidence that applicant's triangular shape is significant, would have been an obvious matter of choice.

10. Regarding MacKendrick, MacKendrick also teach a method of frying chips in molds to provide uniformly shaped chips. However, MacKendrick teaches that one obtains the uniformly shaped chips by frying the dough in the molds that match the cutting pattern of the dough. Again, one of ordinary skill in the art would recognize that a *uniform* chips would facilitate subsequent packaging in a stacked arrangement more than chips that were similar but not uniform *per se*. Thus, MacKendrick provides motivation for further modifying the fry step of Wisdom in that MacKendrick teaches a method of obtaining uniformly shaped fried chips, and *uniform* chips would facilitate subsequent packaging in a stacked arrangement Wisdom et al.

Conclusion

11. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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12. A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

14. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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15. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen
Examiner
Art Unit 1761



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